Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

Tammy McGovern,
Petitioner
v.
Monti and Ann McGovern,
Respondent

On Petition For Writ Of Certiorari
To The Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Questions

The following two questions are the result of a grandparent visitation litigation where the trial court declared that it had violated due process in applying Arizona law to the parent. The court then vacated it's previous orders granting visitation and returned parental control to the fit parent. Subsequently the Arizona Appeals Court, Division Two upheld the court's finding that the parent had been denied due process but remanded the case for a new trial.

1. When a case, involving a fit parent, is remanded for a new trial due to previous failure of the trial court to provide the parent due process does the new trial become such a burden on the parent, family, and parental rights that the new trial constitutes a further violation of due process?

2. Did the Arizona Appeals Court, Division Two, in refusing to grant a stay of the new trial, as anticipated under its own rules, pending the outcome of this petition to the United States Supreme Court further violate due process of the parent by inhibiting her access to appeals allowed by law?

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Kyle O. v. Donald R., 85
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Citations of the Published and Unpublished Opinions in this Case

May 7, 1999 Temporary Vistation Order Pima County Superior Court

April 10, 2000 Order by Minute Entry signed by Judge Adam

June 21,2000 Order granting temporary stay of visitation signed by Judge Adam

August 28, 2000 Order by Minute Entry Signed by Judge Adam

October 11, 2001, Opinion by Arizona Appeals Court, Division II

February 14,2002, Denial of Petition for Review Arizona Supreme Court

March 26, 2002 Denial of Stay of Mandate pending United States Supreme Court Review

April 10,2002 Order setting remand trial date as May 28th, 2002, signed by Judge Adam

Statement of Jurisdiction

On February 14, 2002, the Arizona Supreme Court, without comment, denied a petition to review a earlier published opinion by Division Two or the Arizona Court of Appeals in the case of McGovern v. McGovern, CV-01-0410-PR. The petition of review resulted from an opinion, 2 CA-CV 01-0016 in this same case dated October 11, 2001. This in turn resulted from an appeal from a minute entry by the Pima County Superior Court, D-125189, the Honorable Karen Adam dated August 28, 2000. The United States Supreme Court has jurisdiction in this matter under Rule 11(c).

> "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or[and] has decided and important federal question in a way that conflicts with relevant decisions of this Court." [added by Petitioner to clarify the claim]

It is the Petitioner contention that the ruling of the Arizona Court of Appeals, Division Two (review denied by the Arizona Supreme Court) has. in part, denied her right to due process as defined under the Fourteenth Amendment of the United States Constitution and the portion of this ruling that remands the case for a new trial should be reversed. It is clear

that, at least with the instant case, no Arizona Court is willing to defend or recognize the massive burden that continuing litigation heaps on a fit parent trying to raise her child free from the burden of continuous state instituted litigation.

Further the Petitioner believes the Court of Appeals, Division Two has *de facto,* by denying a routine stay to permit this petition for Certiorari to this Court, attempted to prevent her from placing this matter before this Court for its decision. This adds to the burden the Petitioner faces and further burdens due process guarantee of the Fourteenth Amendment of the United States Constitution. In this matter there is no effective appeal available in the State of Arizona and thus this second question is added to the instant petition for such action as this Court sees fit and proper.

Notice of Service Pursuant to Rule 29

This document has been served by mail on the attorney of record for the opposing party. In addition, since remotely there may be the constitutionality of a state statute in question, this document was also served on the Attorney General of the State of Arizona pursuant to U. S. C. § 2403(b). Proof of service accompanied this document when it was filed with the United States Supreme Court.

Material Facts of the Case

There is no apparent dispute as to the material facts. This case involves a five year old

child named Chloe, her mother Tammy McGovern, and her maternal grandparents, Montie and Ann McGovern (natural parents of the mother Tammy). Chloe's mother and father were not married at the time of her birth on August 25, 1994. The father's parental rights were terminated, and Tammy McGovern, at the invitation of the grandparents, moved into the guest house at her parent's home in Tubac, Arizona with the then two-week old child. Mother and child remained there until January, 1999.

The grandparents provided significant financial support for the mother and child while they resided together. When the mother returned to work in December, 1995, the grandmother provided child care. The grandparents helped feed, cloth, and house the child. Chloe accompanied the grandparents on occasion on extended summer vacations and attended church and church school with them. During this time, however, the relationship between the mother and her parents was strained, the child was clearly loved and adored by all of them.

The mother moved out of her parents' home in January, 1999, and relocated to Tucson, where she continued to work as the sole support of herself and her child while attending the University of Arizona College of Nursing registered in a full time nursing program. She lives in a home which is centrally located and within walking distance of Chloe's school. Many neighbors and friends form a supportive network for both the mother and child. The child is thriving

in school and is completing first grade in the GATE (Gifted and Talented Education) program this year. She has been involved in extracurricular activities such as tap dancing. Her kindergarten teacher, who has more than fifteen years of experience in the field, reported that Chloe was a happy, well-adjusted child who did not appear to be suffering from depression or anxiety as a result of her family arrangements.

The Superior Court of Pima County, Arizona conducted a two-day trial, as a result of a petition for court-ordered visitation filed March 26, 1999 by the grandparents, on March 1 and March 21, 2000. All of the adult parties testified, as did several other witnesses. The Court took the matter under advisement and ruled on April 10, 2000 that visitation with the grandparents was in the child's best interest. The Court ordered a more limited schedule of visitation than was suggested by the grandparents. However, the order far exceeded what the mother requested. She wanted the issue of visitation with the grandparents to be her decision alone.

No evidence was presented that would suggest the mother was anything other than a fit parent committed to the welfare of her child, Chloe. In fact the evidence presented and the Superior Court concluded that the child was thriving in the home created for her by her mother. Life was difficult for the Petitioner as the mother juggled the need to make a living, a full academic program resulting in her graduation with a BS in nursing in December of 2001, time

and care for her child Chloe, all while attempting to fend off the legal onslaught from her natural parents.

For a period of time after the court ordered visitation in April of 2000 the mother attempted to arrange visitation but the grandparents never agreed on visitation timings that were remotely consistent with the mother's difficult and very full life. The mother filed a motion for reconsideration, first based on Arizona case law suggesting the court ordered visitation was well beyond the constitutional guidelines set by Arizona case law. However, prior to any ruling on this matter this Court released its opinion in *Troxel v. Granville*, 120 S.Ct. 2054 (2000). A motion for declaratory judgment was placed before the Superior Court. In addition the grandparents filed an Order to Show Cause, Re: Contempt alleging the mother did not reach adequate visitation arrangements. Superior Court entered an emergency stay of the visitation order and in late August ruled by minute entry, see the Appendix for the full text of this minute entry. Judge Adam, based on *Troxel*, stated that Superior Court had violated the mother's right for a fit parent to raise her child free from burdensome state interference. The grandparents appealed this order resulting in the opinion under discussion in the instant petition.

The full text of this opinion is contained in the Appendix, however a synopsis is as follows. The Appellate court upheld the Superior Court

when it stated it had violated the parent's due process. Citing violations essentially similar to those mentioned in Troxel; failure to place any weight on a fit mother' opinion, failure to grant a presumption that a fit parent acts in the best interests of the child, shifting the burden of proof to prove that visitation should not happen to the mother, and failure to account for the fact that the grandparents had been offered visitation albeit less than they desired.

The Appeals Court however did not agree with the trial court remedy. The Appeals Court remanded the case for a new trial despite factual findings by the trial court that would make a reversal doubtful at best.

Finally the Appeals Court provided some laudable, but limited guidelines on the conduct of the trial court that, in the mother's opinion, inch towards implementing the requirements of this Court for due process in grandparent visitation case. While concerned that these conditions will prove insufficient to assure due process, that is not the issue of this Petition and is left for some future appeal.

The mother presented a timely petition for review, as required by Arizona Rules of Civil Appellate Procedure, to the Arizona Supreme Court. This petition for review was based on the issue presented herein as well as others. This petition was subsequently denied (see the Appendix) leading to the instant petition. Following this denial, the mother applied for a stay of the mandate from the Court of Appeals, Division

Two, a procedure she believes is provided for and routinely granted under the Rules of Arizona Civil Appellate Procedure. To her surprise this stay was denied (see the Appendix) potentially creating a concurrent trial and the review of the appropriateness of a trial by this Court.

Argument for Question 1

This is not a complex question, nor does it require a long list of case law to support the Petitioner's position. Simply stated, the Petitioner has suffered through extreme difficulty in her life raising her child, working to support the two of them as a nurse's aide, while carrying a full academic course load. She did this not only for her own welfare but for the welfare of her young child. Piled on this fit parent was the additional burden of an extended legal action that is now in its fourth year. She went into debt and still has not been able to retire an approximate $11,000 obligation to her attorney for this process.

Emotional stress was extreme as the grandparents have wished to confiscate her child for all the free time she potentially had to spend with her child. To grant their wishes would have come at the price of her and her child's customary activities. In the meantime she has graduated from college, started a new job and now her future seems to have a degree of hope.

Yet now, the Appeals Court wants to start the process over from scratch because the Superior Court failed to provide due process as guar-

anteed to her under the Fourteenth Amendment. This process indeed has at least the same potential for extending into the future, as the current litigation has extended into her past, generating further appeals, and devastating her life and the life of her child throughout the entire grade school years. At issue is when does the burden of litigation become so unbearable that the desire for litigation, to correct state caused error, become in an of itself a violation of due process?

Mother is a fit parent

In *Troxel v. Granville*, 120 S.Ct. 2054 (2000), Justice O'Connor writes for the plurality, "First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." In the instant case, Judge Adam writes in her opinion, "This court was not presented with any evidence that the mother was unfit" , see ¶ 23 in the Appendix. Judge Adam goes on to state in ¶26, "There was not proof that the mother was unfit. She should have been presumed to be a fit parent whose decisions regarding her child were in the child's best interest." Further, the Arizona Appeals Court, Division Two, finds total parallelism between Troxel and the instant case as it stated in ¶12 of its opinion, "The custodial mother in Troxel, **as in our case**, admittedly was a fit parent who had never sought to terminate grandparent visitation entirely." **emphasis**

added Judging by the results, one could conclude that Tammy McGovern, the mother, was doing exceptionally well juggling parenthood with work and school. The Court of Appeals observed in ¶2, "Her kindergarten teacher, who has more than fifteen years of experience in the field, reported that [C.] was a happy, well-adjusted child who did not appear to be suffering from depression or anxiety." Judge Adam observed, "Although the relationship between the mother and her parents was strained, the child was clearly loved and adored by all [grandparents and mother] of them." [added for clarity] (see ¶4 in Appendix).

Not only is there no reason to suspect the mother is not a fit parent, there is every reason to admire and respect her as an exceptional mother, employee, student, and nurse.

Troxel v. Granville

Justice O'Connor in writing for the plurality in *Troxel* in quoting *Prince v. Massachusetts*, 321 U. S. 158 (1944), stated, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Hindrance by the state can be proactive, such as incarcerating the innocent, or passive as Justice Kennedy stated in his dissent in *Troxel*:

> "If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required..."

In forcing unnecessary litigation by remand, more appropriate to a violent criminal than a fit parent, the process itself will hinder the right of a parent to custody and control of her child.

Justice O'Connor in discussing remand in *Troxel* stated:

> "There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice Kennedy recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." Post at 9. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now,

> without forcing the parties into additional litigation that would further burden Granville's parental right."

It is clear that Judge Adam considered and rejected remand as an option as she indicates when describing *Troxel* in ¶15, "The matter [Troxel] was not remanded for further consideration by either the Washington Supreme Court or the trial court." [added for clarity]

The instant case is so parallel in the facts to *Troxel*, the violation of due process so complete, that remand seems unjustified and obviously Judge Adam felt so. The Arizona Court of Appeals, Division Two should have upheld her opinion that stated, "The issue of grandparent visitation is left in the discretion of the mother." (see ¶ 27 in the Appendix). This is a mother who had not totally withheld visitation but merely granted less than the grandparent's desired. Judge Adam recognized this when she stated in ¶7 describing her original order that she vacated, "However, the order far exceeded what the mother requested. She wanted the issue of visitation with the grandparents to be her decision alone." What was unreasonable about that? A mother working as the sole support of the family, going full time to school keeps as precious her limited time with her child. To have her child ripped away by a court order is not a minimal intrusion into her life.

It is timely, in the petitioner's view that the United States Supreme Court made it clear when

litigation itself becomes a burden on due process and rule in this case to prevent the endless litigation imposed by the Arizona Appeals Court, Division Two.

The Arizona Appeals Court Analysis

The Arizona Appeals Court, Division Two, in calling for remand, relied heavily on the Indiana case of *Crafton v. Gibson*, 752 N.E.2d 78 (Ind.App. 07/11/2001). In this case, the question was not developed by the trial court as to whether or not voluntary visitation was offered. (see ¶72 as an example, "Gibson contends that Crafton would not allow any meaningful contact between her and her grandchildren.") Nevertheless, the *Crafton* court noted in ¶114, "We noted that there are different interests at stake in cases where the parties cannot agree to the terms of visitation as opposed to cases were no access has been allowed." And "In the later case, a grandparent would be pursuing the right to have a relationship with the child, while the former case boils down to a mere disagreement between parent and grandparent over how much access is appropriate" (both in quoting a previous Indiana case *Swartz*, Id., 720 N.E.2d at 1222). The *Crafton* court finally concluded that:

> "Although the trial court indicated that it applied a *Troxel* analysis to this case, it appears from the Record and the trial court's reasoning here that no special weight was given to Crafton's decision

> concerning grandparent visitation. Furthermore, the Record is undeveloped with regard to whether the trial court concluded that Crafton had denied Gibson all access to the children or had offered some visitation" as stated in ¶119.

The *Crafton* circumstances are distinguishable from the instant case. The instant case trial court clearly found the mother had offered visits as Judge Adam stated in her section on facts, ¶6, "The grandparents obtained the court-ordered visitation because the mother was not allowing them as much contact with the child as they wished. " (In referring to pre-trial *pende lite* visitation ordered by the superior court.) Later in ¶26 Judge Adam states, "Finally, the fact that the mother had offered limited visitation to the grandparents should have been a factor in this Court's decision" indicating that the mother had offered visitation. Apparently the *Crafton* trial court made no such clear statements as to the parent's intent.

A more appropriate case, referenced by *Crafton*, to rely on for the instant circumstances would have been *Kyle O. v. Donald R.*, 85 Cal.App.4th 848, 102 Cal.Rptr.2d 476 (Cal.App. Dist.3 12/21/2000). In this case the California Appeals Court noted in ¶74,

> "Because the trial court did not make any finding that Kyle was an unfit parent, Kyle is entitled to a presumption that he will act in his child's best interests, and his

> decision regarding the amount of visitation and his preference for a less structured and more normal and spontaneous manner of visitation must be given deference."

Going on in ¶75 in factual circumstances very similar to the instant case the *Kyle O.* Court concluded:

> "Kyle agreed that visitation was appropriate, agreed that Rachel needed a relationship with the grandparents, and agreed to allow visitation with them; he only contested their right to specify the amount and timing of the visitation. Kyle simply wanted Rachel to have a more flexible and spontaneous relationship with her maternal grandparents, such as she had with her paternal grandparents."

The final conclusion by the *Kyle O.* Court was expressed in ¶79, "Because the visitation order violated Kyle's parental rights guaranteed by the Due Process Clause of the Fourteenth Amendment, the order must be reversed, and remand for further proceedings on the question of **visitation is inappropriate" emphasis added**. It appears that the Arizona Court in a similar factual situation became confused concerning some voluntary visitation, prior to the *pende lite* award, that did not occur due to an extended childhood infection. This confusion in and of itself makes the case for parental control over

visitation because circumstances with children change. In fact a rigid court ordered visitation schedule was at the root of the many of the problems dealt with by the *Kyle O.* court when it stated in ¶77:

> "The only evidence they [grandparents] offered to support their belief that court-ordered visits were necessary was Kyle's hostility toward the grandparents. But his hostility was caused in part by their pursuit of court-ordered visits and their refusal to deviate from the schedule without receiving an exact quid pro quo even if their refusal was not in Rachel's best interest. The grandparents' argument was circular and insufficient to overcome the presumption in favor of Kyle's fundamental right to make parenting decisions regarding his child's visits with a non-parent."

Like Kyle O., the fit mother, Tammy McGovern, in the instant case, merely wants her own judgment as to what is in the best interest of her child at the moment, not as determined by a court months or years prior. The Arizona Court of Appeals Court's reliance on the *Crafton* reasoning seems out of place in the instant case since the basic facts are not the same and remand for more fact finding seems to serve only the expan-

sion of the interference with the parental right of custody and control.

Further, remand appears in contrast to the Kansas Supreme Court conclusion in similar circumstances as it stated, "However, since we have determined that the Paillets [grandparents] did not meet their burden of proof as to both requirements of the statute, it would serve no purpose to remand the matter to the district court." (see *Kansas v. Paillet*, 2001.KS.0000035 No. 82,950 (Kan. 02/02/2001) ¶82)[added for clarity]. The justification for remand is more an expensive and extensive fishing expedition than one of any real expectation of the discovery of new factual basis for visitation. The facts of the case have been thoroughly examined by the trial court and it is only in examining those facts in light of the *Troxel* ruling that resulted in the ruling of the court. There has been no failure to find necessary facts as was the case in *Crafton*. To return to trial is to violate *res judicata* and to subject the parent to endless need to defend herself. If the grandparents feel a change of circumstances, sufficient to result in an altered ruling, has occurred since the last fact finding trial, they may enter a new order to show cause.

Argument for Question 2

The Arizona Rules for Civil Appeal rule 24(b) states:

"(b) Stay of Mandate Pending Application for Certiorari.

> (1) A stay of the issuance of the mandate of either the Court of Appeals or the Arizona Supreme Court pending application to the United States Supreme Court for a writ of certiorari may be granted upon request."

While this rule is not automatic and the operative word is "may", it is the Petitioner's belief that this rule is customarily honored by the Appeals Court. To not do so would create the legal crisis likely to be created in the instant case. The Petitioner filed a timely request for the stay stating her expectation to timely file this petition. As contained in the Appendix, the Appeals Court of Arizona, Division Two denied this request without comment as to why it was not granted. The Petitioner thus forms no opinion as to whether the motivation contained a prejudicial component or was for other reasons.

However, no matter the motivation, the only practical effect of this denial is that it tends to make the filing of a Petition for Writ of Certiorari with the United States Supreme Court less viable. The Petitioner believes that even single parents raising children are afforded access to the United States Supreme Court to the degree reflected by this Court's rules. Thus the effect of this order is further denial of due process under the Fourteenth Amendment to the US Constitution. As well it creates many practical issues for the trial court since it is prohibited in Arizona law, mandate or not, from taking any action that

is not in furtherance of the appeal. Clearly a new trial with presumably a new order cannot be in furtherance of the appeal when the issue at appeal is whether that trial is lawful or not. When the mandate is issued the trial, that is central to this petition may well start pre-trial activity (as the writing of this petition Judge Adam had scheduled a trial for May 28th, 2002 and the Petitioner filed a motion for continumance until this petition is resolved) concurrently with review by this court. As a practical matter there is no review available of this order in Arizona. Before the Arizona Supreme Court could review this order the issue would become moot. Actions by the United States Supreme Court could be the ordering of a stay of further trial activity until this petition is resolved or it could take this as a further indication of the violation of due process by the Arizona Court system.

Conclusion

The Arizona Appeals Court, Division Two in a case factually very similar to *Troxel*, upheid a Superior Court Judge's opinion that she had violated due process albeit in a *pre-Troxel* ruling. The Petitioner, the fit parent in the instant case, while gratified with that result was dismayed to learn that four years of litigation was not to be enough. The court said the grandparents, her natural parents, get a second chance, overturning what she felt was the well considered opinion of the trial judge.

Her whole college career, hard enough, was indeed clouded with litigation or the threat of litigation. It has left her in substantial debt and emotionally scarred as only those attacked by their own parents can be! And now who knows how much more. Win or lose in trial likely another appeal and another costly trip through the Arizona Court System. Four or five more years puts her child near her teenage years. While other grade school parents worry about the school play, PTA bake sale, and keeping their children away from drugs and other harms of our modern society, she worries about tomorrow's court appearance or next week's petition deadline.

Some may say "just give up!" and indeed apparently that is her natural parent's legal strategy. Make the parent do things to the child that in good conscience she cannot. Force visitation simply in the first place because a judge thinks he or she knows better how to raise her child than does the committed and caring 24/7 mother. Now to force visitation simply because the cost of opposition becomes too oppressive. Neither approach satisfies the due process requirement of the Fourteenth Amendment, at least not in the Petitioner's eyes. It is time, in her view, that the United States Supreme Court, sets the rules for litigation in the cases of those whose crime is only being a fit parent. _

RESPECTIVELY SUBMITTED this 22 day of April, 2002.

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Appendix

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III. Denial of Review, Arizona Supeme Court, page 59

IV. Denial of Stay of Mandate for Petition for Writ of Certiorari, page 61

Superior Court Minute Entry of Judge Adam

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PRO TEMPORE: HON. KAREN ADAM

COURT REPORTER: NONE

CASE NO. **D125189**

DATE: August 28,2000

MONTIE McGOVERN and ANN McGOVERN,
MATERNAL GRANDPARENTS
Petitioners

and

TAMMY McGOVERN
Respondent

MINUTE ENTRY

IN CHAMBERS MINUTE ENTRY RE RESPONDENTS MOTION FOR DECLARATORY JUDGMENT, NOTICE OF SUPPLEMENTAL AUTHORITY, REQUEST FOR EMERGENCY STAY OF VISITATION, AND REQUEST FOR ATTORNEY'S FEES/PETITIONERS' PETITION FOR CONTEMPT AND CLARIFICATION OF ORDER AND ORDER TO SHOW CAUSE AND REQUEST FOR ATTORNEY'S FEES/ PETITIONERS' MOTION TO DISMISS

¶1 The Court has received and reviewed the petitioners' response and the respondent's reply. The Court also received second and third supplemental authorities from the respondent. Those supplements were not used as they were filed after the deadline for the reply and permission was not sought for their consideration. The Court had previously received and reviewed respondent's motion for reconsideration, motion for declaratory judgment, supplemental authority, and request for attorney's fees, and petitioners' petition for contemt and clarification of order.

¶2 The issue before the Court is whether the current order for grandparent visitation in this matter is constitutional in light of the recently decided United States Supreme Court case of *Troxel v. Granville,* 120 S.Ct. 2054(2000),_____U.S._____(2000).

I. Facts

¶3 This case involves a five year old child named Chloe, her mother Tammy McGovern, and her maternal grandparents, Monte and Ann McGovern. Chloe's nother and father were not married at the time of her birth on August 25, 1994. The father's parental rights were terminated, and Tammy McGovern moved into the guest house at her parent's home in Tubac with the then two-week old child. Mother and child remained there until January, 1999.

¶4 The grandparents provided significant support for the mother and child while they resided

together. When the mother returned to work in December, 1995, the grandmoher provided child care. The grandparents fed, clothed, and housed the child. She accompanied them on extended summer vacations and attended church and church school with them. Although the relationship between the mother and her parents was strained, the child was clearly loved and adored by all of them.

¶5 The mother moved out of her parents' home in January, 1999, and relocated to Tucason, where she continued to work and to attend the University of Arizona College of Nursing. She lives in a home which is centrally located and within walking distance of Chloe's school. Many neighbors and friends form a supportive network for both the mother and child. The child is thriving in school and will start first grade in the GATE (Gifted and Talented Education) program. She has been involved in extracurricular activities such as tap dancing. Her kndergarten teacher, wh has more than fifteen years of experience in the field, reported that Chloe was a happy, well-adjusted child who did not appear to be suffering from depression or anxiety.

¶6 At the time the Court entered the order at issue in this case, the child was visiting with her grandparents once a week for six hours, on either Saturday or Sunday, pursuant to a temporary order entered on May 7, 1999. The grandparents obtained the court-ordered visitation because the mother was not allowing them as much contact with the child as they wished.

In preparation for the hearing in the case, the grandparents retained Jan Harrell, Ph.D, to conduct a grandparent-visitation evaluation. In July and August 1999, Dr. Harrell conducted interviews of all the parties, observed the child with each, and evaluated the results of the Minnesota Multiphase Personality Inventory II (M.M.P.I.) testing on the adults. She also reviewed written materials and comments from the parties and collateral sources. Dr. Harrell found that the child was very attached to her grandparents and recommended she have regular and significant contact with them.

¶7 This Court conducted a two-day trial in the matter on March 1 and March 21, 2000. All of the adult parties testified, as did Dr. Harrell and several other witnesses. Dr. Harrell's report and other exhibits were introduced. The Court took the matter under advisement and ruled on April 10, 2000, that visitation with the grandparents was in the child's best interest. The Court ordered a more limited schedule of visitation than was suggested by Dr. Harrell and the grandparents. However, order far exceeded what the mother requested. She wanted the issue of visitation withthe grandparents to be her decision alone.

II. Arizona law

¶8 In reaching its decision, this Court relied on the Arizona statutes and case law governing grandparent visitation. The Court spedifically found that the grandparent visitation statute

A. R. S. § 25-409, governed in this case, rather than the third-party custody or *in loco parentis* statute, A. R. S. § 25-415. The grandparent visitation statute was enacted in 1984. Prior to that time, there was no statutory authority for grandparent visitation. The statute was amended in 1988, 1992, and 1997, and now provides reasonable visitation may be granted tothe grandparents of a child during his/her minority on finding that (1) the parents of the child are divorced, were never married or one is deceased or missing for at least three months, and that, (2) such visitation would be in the child's best interest. The statute contains a list of factors that the Court must consider in determining the best interests of the child. Those factors are:

1. The historical relationship, if any, between the child and the person seeking visitation;

2. The motivation of the party seeking visitation;

3. The motivation of the person opposing visitation;

4. The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities; and

5. If one or both child's parents are dead, the benefit in maintaing an extended family relationship. A. R. S. § 25-409 (C)(1-5). In addition there is a requirement that, if logistically possible

and appropriate, any visitation ordered should occur at the time the child is spending time with or residing with the parent through whom the grandparents claim access. A. R. S. § 25-409(D).

¶9 There is limited Arizona case law interpreting the grandparent visitation statute. *Graville v. Dodge*, 195 Ariz. 119, 985 P.2d 604, (App 1999) is the seminal case. There the maternal grandparents sought visitation with their granddaughters after the girls' mother, their daughter, died. The mother and children had resided with the maternal grandparents for extended-periods of time over the course of several years. After the mother died, the father decided to stop contact between the grandparents and the girls. The-grandparents filed a request for court-ordered visitation pursuant to the grandparent visitation statute.

¶10 Prior to the trial, the Court appointed a psychologist to determine whether visitation with the grandparents was in the best interests of the children. She concluded that it was. After the trial, the Court ordered limited visitation and the father appealed, arguing that the statute was unconstitutional and the amount of visitation ordered was unreasonable.

¶11 The Court of Appeals, Division One, upheld the statute and the specific visitation order. Applying the rational basis standard of review, the Court found that the law was reasonably related to a legitimate state interest "...in promoting healthy family relationships that enable children to become well-adjusted, responsible

adults. The statute in question promotes these goals by providing for visitation with grandparents when it is shown to be in the best interests of the child." *Id.* at 125 Altough the Court recognized the well-established principle that parents have a fundamental right under the Fourteenth Amendment to raise their children without state interference, the statute was found to be a minimal burden on that right.

¶12 The father in *Graville* also urged that a showing of harm to the children must be shown before the state may interfere with the fundamental right to parent. He cited *Cochise County Juv. Action No. 5666-J*, 133 Ariz. 157, 650 P.2d 459(1982) in support of that position. In that case, as in other dependency cases, a showing of harm to the children is required before state action can be taken to interfere with parental rights. The *Graville* Court distinguished the grandparent visitation issue from issues raised in dependency case where the state seeks full legal custody and control of children. The Court found that no harm to the children need be shown before grandparent visitation is ordered. See *Graville*, 119 Ariz. at 127.

¶13 In addition to finding the statute constituional on its face, the Court also ruled that visitation order was reasonable and was only a minimal intrusion into the father's right to parent his children. The Court found that an award of eight hours a month plus five days annually during vacation periods was not excessive because the children had spent considerable

amount of time living with the grandparents. The dates and times were flexible and did not impinge on the children's regularly scheduled activities. Other more restrictive directives from the superior court were stricken as being too intrusive on the father's constitutional right to parent. Those included requiring the father to encourage weekly phone calls, to consider the grandparents first for babysitting, and to refain from discussing custody issues with the children.

¶14 The father in *Graville* further argued that the proper standard of proof for establishing what is in the best interest of children is clear and convincing evidence. The statute does not set forth a burden of proof. The Court noted that, on appeal, a trial court's findings will be sustained if the record contains substantial evidence to support them and if there is no abuse of discretion. The Court did find substantial evidence of best interest in this case and that the trial court did not abuse discretion. The Court of Appeals found the grandparent statute constitutional and upheld the visitation order.

III. *Troxel v Granville*

¶15 In *Troxel v. Granville*, 120 S.Ct. 2054 (2000);_____U.S._____(2000), the United States Supreme Court considered an award of grandparent visitation made pursuant to a Washington statute that allowed any person to petition the superior court for visitation rights at any time, and that authorized the court to grant that

visitation if it was in the best interests of the child. The Court found the application of that statute unconstitutional in the case at bar and declare the Washington statute unconstitutional on its face. The matter was not remanded for further consideration by either the Washington Supreme Court or the trial court.

¶16 The paternal grandparents in Troxel sought visitation with their grandchildren after their son, the children's father, committed suicide. He and the children's mother were never married. The mother offered visitation but it was not as much as the grandparents wanted, and they petitioned the superior court for an order. After the hearing, the trial judge ordered visitation one weekend per month, one week during the summer and four hours on each of the paternal grandparents' birthdays. The mother appealed.

¶17 The Washington Court of Appeals vacated the visitation order and dismissed the paternal grandparents' petition, based on a lack of standing. The Washington Supreme Court upheld the dismissal, though, on other grounds, and found the entire visitation statute unconstitutional. The Court ruled that the statute unconstitutionally infringed on the fundamental rights of parents to raise their children and did not require a showing of harm before state interference with that right. Further the Court the Court found that the statute was too broad in that it allowed anyone, at any time, to request visitation, and only a best interest finding was required for such an order.

¶18 In a plurality opinion, written by Justice O'Connor, the United States Supreme Court ruled that the application of the Washington statute in this case violated the mother's fundamental right to parent as guaranteed by the Due Process Clause of the Fourteenth Amendment. The Court noted that "the liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 2060. The fundamental right of parents to raise children their children without state interference has been continuously upheld, from *Meyer v. Nebraska*, 262 U.S. 390 (1923) through *Parham v. J.R.*, 442 U.S. 584 (1979).

¶19 The United States Supreme Court was concerned with both the breadth of the Washington statute and that it lacked a requirement that a parent's decision regarding visitation be accorded any weight. Under Washington law, a court could completely disregard the decision of a fit parent if the judge found that visitation is in the child's best interest.

> "[the] Washington statute places the best-interest determination soley in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view nedessarily prevails. Thus in practical effect in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent

> concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest." *Id. at 2062* (emphasis in original)

The *Troxel* Court noted that the trial judge had found no special factors that would justify state interference with the mother's decision regarding visitation, and absent those factors, the trial judge's application of the statute in this case violated the mother's due process rights.

¶20 Specifically, the *Troxel* Court noted three problems with the visitation order. First, there was no allegation that mother was not a fit parent. There is a presumption that fit parents act in the best interest of their children. *See Parham, 442 U.S. at 602.* Absent a showing that a parent is not properly caring for his or her children, there should be no reason for the state to "inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of the parent's children." *Troxel,* 120 at 2061.

¶21 The second problem was that the trial judge gave no deference to the mother's determination of what was in her children's best interests. The trial judge should have presumed her to be a fit parent making decisions in the best interest of her children. *Id.* at 2062. Instead, the trial judge appeared to presume that the visitation would be granted unless it was shown that the children would be negatively impacted. That

presumption resulted in a shift in the burden of proof to the mother, which further infringed on her fundamental right to make decisions in the best interest of her children. *Id.*

¶22 Finally, the trial court gave no weight to the mother's repeated offer of visitation to the grandparents. Instead he substituted his opinion as to what visitation would be in the best interest of the children. When combined with the other two problems noted above, the Court found that "visitation order in the case was an unconstitutional infringement on (the mother's) fundamental right to make decisions concerning the care, custody, and control of her two daughters." *Id*, at 2063.

IV. Application of *Troxel v. Granville* to McGovern v. McGovern

¶23 The Arizona grandparent visitation statute is not written as broadly as the Washington statute at issue in *Troxel.* Nonetheless, as applied in the instant case, the Court finds the *Troxel* analysis appropriate. First, the Arizona statute, as interpreted by *Graville v. Dodge, supra*, does not require proof that the parent opposing visitation is unfit and therefore not making decisions in the best interest of the children. This court was not presented with any evidence that the mother was unfit and did not require such evidence before proceeding. Second, the statute does not attribute any special weight to the decision of a presumably fit parent. The only stat-

utory reference to the parent's wishes is the requirement that the court consider the parent's motivation in opposing visitation as one of several factors in determining whether visitation is in the best interest of the child. In its original visitation order, this Court considered the mother's motivation for wanting to limit visitation along with all of the other factors set forth in the statute. This Court afforded the mother's decision no special weight.

¶24 Third, the same trial procedures were used in the instant case as were used by the trial judge in *Troxel*. In the trial of this case, the grandparents presented evidence in support of their position that visitation was in the best interest of the child. The mother was then required to rebut the grandparent's evidence and present evidence in support of her own decision. The burden of proof was thus shifted to the mother to show why visitation was not in the best interest of the child.

¶25 Finally, A. R. S. § 25-409 does not make a distinction between parents who refuse all visitation and those who do not. Visitation may be awarded according to a trial court's determination of best interest and reasonableness, regardless of whether a parent has agreed to some contact with the grandparents. In its original order, this Court similarly did not credit the mother with offering visitation to the grandparents, though less than they wanted.

VI. Conclusion

¶26 The Court finds that its application of the

grandparent visitation statute in this case violated the mother's fundamental right to parent her child without state interference as guaranteed by the Due Proces Clause of the Fourteenth Amendment. See *Troxel*, 120 S.Ct. 2054 (2000). There was not proof that the mother was unfit. She should have been presumed to be a fit parent whose decisions regarding her child were in the child's best interest. Once the matter proceeded to trial, the burden of proof should have been on the grandparents to show that the mother's decision wan not in the child's best interest. The mother's decision regarding visitation should have been given special weight. Finally, the fact that the mother had offered limited visitation to the grandparents should have been a factor in this Court's decision. For the reasons set forth,

¶27 **IT IS THEREFORE ORDERED** granting the motion for reconsideration and vacating the order visitation entered on April 10, 2000. The issue of grandparent visitation is left in the discretion of the mother.

IT IS FURTHER ORDERED denying the request for declaratory judgment.

IT IS FURTHER ORDERED denying the request for attorney's fees.

IT IS FURTHER ORDERED denying the petition for contempt and for clarification of the order.

Karen S. Adam

Hon. Karen Adam

cc: Hon. Karen Adam
Domestic Calendaring
Cheryl K. Copperstone, Esq.
William W. Wissler, Esq.
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Note: The paragraph numbers have been added to add clarity and enable referencing.

Appeals Court Opinion

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO
MONTIE McGOVERN and ANN McGOVERN,
Petitioners/Appellants,
v.
TAMMY McGOVERN,
Respondent/Appellee.

2 CA-CV 01-0016
DEPARTMENT A
O P I N I O N
APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. D-125189
Honorable Karen S. Adam, Judge Pro Tempore
AFFIRMED IN PART;
VACATED IN PART AND REMANDED
Cheryl K. Copperstone
Roberts & Rowley, Ltd.
By Paul S. Rowley
Tucson
Attorney for Petitioners/Appellants
Mesa
Attorneys for Respondent/Appellee
P E L A N D E R, Judge.

¶1 Petitioners/appellants Montie and Ann McGovern filed an action under Arizona's grandparents' visitation statute, A.R. S. § 25-409,

to obtain court-ordered visitation with their granddaughter, C. Their daughter, respondent/ appellee Tammy McGovern, opposed the petition.

After a two-day trial, the trial court granted the grandparents' petition in April 2000. In August, however, the court granted the mother's motion for reconsideration and vacated its earlier order in light of Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), decided after the court's initial ruling. The trial court did not conduct any further proceedings, but rather, left visitation to the sole discretion of the mother. This appeal by the grandparents followed. We affirm in part, vacate in part, and remand the case for further proceedings.

BACKGROUND AND PROCEDURAL HISTORY

¶2 The trial court's August 2000 ruling succinctly summarizes the undisputed factual background: This case involves a five-year old child [C.], her mother Tammy McGovern, and her maternal grandparents, Mont[i]e and Ann McGovern. [C.]'s mother and father were not married at the time of her birth on August 25, 1994. The father's parental rights were terminated, and Tammy McGovern moved into the guest house at her parent[s'] home in Tubac with the then two-week-old child. Mother and child remained there until January, 1999. The grandparents provided significant financial support for the mother and child while they resided together. When the

mother returned to work in December, 1995, the grandmother provided child care. The grandparents fed, clothed and housed the child. She accompanied them on extended summer vacations and attended church and church school with them. Although the relationship between the mother and her parents was strained, the child was clearly loved and adored by all of them. The mother moved out of her parents' home in January, 1999, and relocated to Tucson, where she continued to work and to attend [college]. She lives in a home which is centrally located and within walking distance of [C.]'s school. Many neighbors and friends form a supportive network for both the mother and child. The child is thriving in school . . . [and] has been involved in extracurricular activities . . . . Her kindergarten teacher, who has more than fifteen years of experience in the field, reported that [C.] was a happy, well-adjusted child who did not appear to be suffering from depression or anxiety. At the time the Court entered the order [granting visitation] in this case, the child was visiting with her grandparents once a week for six hours, on either Saturday or Sunday, pursuant to a temporary court order entered on May 7, 1999.

¶3 It is undisputed that, over the four and one-half years the mother and C. lived with the grandparents, a significant and loving bond developed between the grandparents and C. The grandparents' contact with C. was daily and constant. When the mother and C. relocated

to Tucson, the grandparents felt a great personal loss and were also concerned about the effect this disruption of contact would have on their granddaughter. They immediately sought to establish regular visitation with C., and the mother assured them she would allow that. The record, however, reflects that, except for two or three weekend visits in early 1999, no visitation occurred for several months until the stipulated pendente lite visitation order in May, issued as a result of the grandparents' petition for court-ordered visitation. The record also reflects that the mother did not offer any additional visitation to the grandparents, other than some make-up time, from the time the temporary order was issued in May 1999 until the trial in March 2000.

¶4 The parties, witnesses for both sides, and a court-appointed psychologist testified at trial. In April 2000, the trial court ruled in pertinent part:

> THE COURT FINDS that visitation with the grandparents is clearly in the best interest of the child. There is a long, caring relationship between them. The grandparents' motivation for visitation is primarily because of their love of the child and their wish to remain in her life. The mother's motivation in denying the requested visitation is primarily because of her desire to act as an independent parent without undue influence or involvement from others. THE COURT DOES FIND, however, that the

> quantity of visitation time requested is excessive, may have an adverse impact on the child's customary activities, and is greater than the minimal intrusion contemplated by *Graville* [*v. Dodge*, 195 Ariz. 119, 985
> P.2d 604 (App. 1999)].

IT IS THEREFORE ORDERED that the following visitation shall be awarded to the maternal grandparents, beginning April 15, 2000:

1. One weekend per month, from Friday after school through Sunday, until one hour before bedtime.
2. The first four days and overnights of Christmas vacation with return to the mother, at the latest, by December 23 at 5:00 p.m.
3. The first two days and overnights of Spring break.
4. Two weeks of summer vacation. If there is some overlap with regularly scheduled visitation, there shall be no makeup visitation without the mother's agreement.

¶5 The mother later moved for reconsideration and for a declaratory judgment based on Troxel. In a thorough, well-reasoned order, the trial court granted the motion for reconsideration and vacated its April order, ruling as follows:

The Court finds that its application of the grandparent visitation statute in this case violated the mother's fundamental right to parent her child

without state interference as guaranteed by the Due Process Clause of the Fourteenth Amendment. See *Troxel*, 120 S.Ct. 2054 (2000). There was no proof that the mother was unfit. She should have been presumed to be a fit parent whose decisions regarding her child were in the child's best interest. Once the matter proceeded to trial, the burden of proof should have been on the grandparents to show that the mother's decision was not in the child's best interest. The mother's decision regarding visitation should have been given special weight. Finally, the fact that the mother had offered limited visitation to the grandparents should have been a factor in this Court's decision. For the reasons set forth, IT IS THEREFORE ORDERED granting the motion for reconsideration and vacating the order for visitation entered on April 10, 2000. The issue of grandparent visitation is left in the discretion of the mother.

DISCUSSION

¶6 We review for an abuse of discretion a trial court's decision to grant or deny visitation. Armer v. Armer, 105 Ar iz. 284, 289, 463 P.2d 818, 823 (1970); Graville v. Dodge, 195 Ariz. 119, ¶37, 985 P.2d 604, ¶37 (App. 1999) (Dodge I). That same standard of review applies to a trial court's ruling on a motion for reconsideration. Cf. Kirby v. Rosell, 133 Ariz. 42, 46, 648 P.2d 1048, 1052 (App. 1982) (grant or denial of motion for new trial within sound discretion of trial court that will not be upset absent clear abuse of discretion); Modla v. Parker, 17 Ariz. App. 54, 56,

495 P.2d 494, 496 (1972) (order setting aside final judgment will not be disturbed absent clear abuse of trial court's discretion). This appeal, however, raises issues of statutory interpretation and constitutional law, which we review de novo. Ramirez v. Health Partners of Southern Arizona, 193 Ar iz. 325, ¶6, 972 P.2d 658, ¶ 6 (App. 1998).

¶7 The grandparents challenge the trial court's ultimate ruling, contending the court's original order granting visitation pursuant to § 25-409 did not offend any constitutional due process constraints set forth in *Troxel.* The mother counters that Troxel compelled reversal of the first order because, in granting court-ordered visitation against her wishes, the trial court had failed to apply certain constitutionally mandated safeguards later established in *Troxel.* The first issue, therefore, is whether the statute, as applied in the trial court's original order, contravened *Troxel* by "violat[ing] the mother's fundamental [constitutional] right to parent her child without state interference," as the court ultimately ruled. And, if so, does that conclusion mandate the trial court's futher ruling that "[t]he issue of grandparent visitation is left in the discretion of the mother"? Our uncertainty about the specific meaning of that latter ruling and the lack of any

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[1]C. admittedly "was born out of wedlock," one of the three enumerated conditions under subsection (A). A. R.S. § 25-409(A)(3).

majority opinion in *Troxel* complicates the resolution of these issues.

¶8 Section 25-409 provides in pertinent part:
A. The superior court may grant the grandparents of the child reasonable visitation rights to the child during his minority on a finding that the visitation rights would be in the best interests of the child and any of the following [three conditions][1] are true:
. . . .
C. In determining the child's best interests the court shall
consider all relevant factors, including:
1. The historical relationship, if any, between the child and the person seeking visitation.
2. The motivation of the requesting party in seeking visitation.
3. The motivation of the person denying visitation.
4. The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities.
5. If one or both of the child's parents are dead, the benefit in maintaining an extended family relationship.
¶9 "[P]arents have a constitutionally protected right under the Fourteenth Amendment
to raise their children as they see fit." *Dodge I*, 195 Ar iz. 119, ¶19, 985 P.2d 604, ¶ 19; see also *Troxel*, 530 U.S. at 65-66, 120 S. Ct. at 2059-60, 147 L. Ed. 2d at 56. As the court in Dodge concluded, however, grandparent visitation pursu-

ant to § 25-409 "does not substantially infringe on parents' fundamental rights." 195 Ariz. 119, ¶23, 985 P.2d 604, ¶ 23.[2] In rejecting a parent's constitutional challenge to § 25-409, the court further concluded that the statute "is rationally related to furthering the state's legitimate interest in enabling children to become responsible adults by fostering relationships between grandchildren and their grandparents." Id. at ¶ 27.
¶10 The facial constitutionality of § 25-409 is not at issue here. Rather, we must address the

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[2]In *Graville v. Dodge*, 197 Ariz. 591, ¶ ¶14, 21-22, 5 P.3d 925, ¶¶14, 21-22 (App. 2000) (Dodge II), Division One held that "the legislature intended to allow the trial court to order supervised visitation under section 25-410(B) in grandparent visitation cases" and rejected the father's constitutional challenge to the trial court's order appointing a psychologist to supervise the grandparents' visitation. The United States Supreme Court, however, vacated that decision and remanded the case for reconsideration in light of Troxel. Dodge v. Graville, ___ U.S. ___, 121 S. Ct. 2584, 150 L. Ed. 2d 745 (2001) (mem.).

[3]Apparently, Justice Souter also agreed that the Washington statute was overbroad. 530 U.S. at 79, 120 S. Ct. at 2067, 147 L. Ed. 2d at 65 (Souter, J. , concurring in the judgment).

trial court's rulings in light of Troxel to determine whether § 25-409 was, or may be, constitutionally applied in this case.

¶11 Both *Dodge I* and the trial court's initial ruling in this case predated Troxel, in which the United States Supreme Court concluded that Washington's nonparental visitation statute was unconstitutional as applied. 530 U.S. at 73, 120 S. Ct. at 2064, 147 L. Ed. 2d at 61. Because the Supreme Court disposed of Troxel with multiple opinions, none of which garnered a majority of the justices, it is difficult to extract and

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[4]Justices Stevens and Kennedy also recognized that presumption. 530 U.S. at 87, 120 S. Ct. at 2071, 147 L. Ed. 2d at 69 (Stevens, J. , dissenting); id. at 97-98, 120 S. Ct. at 2077, 147 L. Ed. 2d at 76 (Kennedy, J. , dissenting); see also Eric B. Martin, Note, by the Supreme Court: Suggestions for a Constitutional Nonparental Visitation Statute After Troxel v. Granville, 76 Wash. L. Rev. 571, 588-89 (2001); Susan Tomaine, Comment, Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family, 50 Cath. U. L. Rev. 731, 773-74 (2001). And, Justice Souter expressed concern with the lack of any presumption or weight to be given to the parent's visitation decision under Washington's statutory scheme. 530 U.S. at 78 n. 2, 120 S. Ct. at 2066 n.2, 147 L. Ed. 2d at 64 n.2 (Souter, J. , concurring in the judgment).

apply clear constitutional principles from the case. In the plurality opinion authored by Justice O'Connor, however, four justices characterized the Washington statute as "breathtakingly broad,"[3] id. at 67, 120 S. Ct. at 2061, 147 L. Ed. 2d at 57; recognized a "presumption that fit parents act in the best interests of their children, "[4] id. at 68, 120 S. Ct. at 2061, 147 L. Ed. 2d at 58; and concluded that a trial court "must accord at least some special weight to the parents' own determination" with respect to nonparental visitation. Id. at 70, 120 S. Ct. at 2062, 147 L. Ed. 2d at 59.

¶12 The custodial mother in *Troxel,* as in our case, admittedly was a fit parent who had never sought to terminate grandparent visitation entirely.[5] Id. at 68, 71, 120 S. Ct. at 2061, 2062-63, 147 L. Ed. 2d at 58, 60. According to the plurality decision, the Washington trial court not only had failed to recognize a presumption that favored the mother's determination, but also had applied an opposite presumption by placing on her, "the fit custodial parent, the burden of disproving that visitation would be in

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[5]The trial court in our case apparently found that the mother had not completely denied visitation to the grandparents at any time pertinent to its ruling. The record, however, reflects that visitation neither occurred nor was offered for approximately four months between late January 1999 and the May *pendente lite* order.

the best interest of her daughters." Id. at 69, 120 S. Ct. at 2062, 147 L. Ed. 2d at 59. In addition, the plurality opinion noted that the Washington trial court had "failed to accord the determination of [the mother] . . . any material weight," id. at 72, 120 S. Ct. at 2063, 147 L. Ed. 2d at 60, and had given "no weight to [her] having assented to visitation even before the filing of any visitation petition or subsequent court inter vention." Id. at 71, 120 S. Ct. at 2063, 147 L. Ed. 2d at 60. Based on all of those factors, the plurality concluded that the Washington statute, as applied to the mother and her family, violated her fundamental due process right to make decisions about the care, custody, and contr ol of her children. Id. at 75, 120 S. Ct. at 2065, 147 L. Ed. 2d at 62.

¶13 After *Troxel* and after the trial court's ultimate ruling in this case, Division One once again was called upon to address the constitutionality of § 25-409. *Jackson v. Tangreen*, 199 Ariz. 306, 18 P.3d 100 (App. 2000). The court reaffirmed its holding in *Dodge I* that § 25-409 "is constitutional on its face," id. at ¶ 31, and concluded that the statute " satisfies the due process concerns articulated in *Troxel*." Id. at ¶12. The court stated, "by applying the statute as written, Arizona courts do not violate the Due Process Clause." Id. at ¶14. The court also remarked that § 25-409 "applies only in cases in which a parent has denied visitation, not merely limited it." Id.

¶14 We agree with *Jackson* that *Troxel* does not

require us to invalidate § 25-409. See, e.g. , *Lopez v. Martinez*, 102 Cal. Rptr . 2d 71, 77-78 (Ct. App. 2000); *Crafton v. Gibson*, 752 N.E.2d 78, 92 (Ind. App. 2001); *Zeman v. Stanford*, 789 So. 2d 798, 803 (Miss. 2001); Fitzpatrick v. Youngs, 717 N.Y. S.2d 503, 506 (N.Y. Fam. Ct. 2000). But because the constitutionality of the statute as applied is at issue here and because we question some of the broad statements in *Jackson*, we attempt to offer further guidance about *Troxel's* impact on the interpretation and application of § 25-409.

¶15 We first note that the statute has several self-limiting features. For example, the statute is framed in permissive rather than mandatory terms, allowing but not requiring the superior court to grant "reasonable visitation rights" to grandparents. § 25-409(A). In addition, such rights may arise only if the trial court finds that grandparent visitation "would be in the best interests of the child" and that one of the three enumerated conditions in subsection (A) exists. And, in determining the child's best interests, the court is required to consider " all relevant factors," § 25-409(C), including, but not limited to, those set forth in subsection (C). See *Jackson*, 199 Ar iz. 306, ¶11, 18 P.3d 100, ¶ 11.

¶16 *Dodge I* and *Jackson* also recognize other significant principles that should affect a trial court's decision under § 25-409 on whether to order grandparent visitation and, if so, how-much. As noted in *Dodge I*, the statute " is structured to enable the [trial] court to make

grandparent visitation a minimal burden on the rights of the child's parents." 195 Ariz. 119, ¶23, 985 P.2d 604, ¶ 23. In other words, "if the court decides to grant visitation, the order must be as minimally intrusive as possible." Id. at ¶ 33. The court in *Dodge I* also noted the legislature's awareness of "'parents' superior right to the custody and care of their children.'" Id., quoting *West v. West*, 689 N.E.2d 1215, 1221 (Ill. App. 1998). See also *Jackson*, 199 Ar iz. 306, ¶14, 18 P.3d 100, ¶ 14.

¶17 Meshing those established concepts with our reading of *Troxel*, we distill the following constitutionally based principles that a trial court should also follow in determining and quantifying grandparent visitation rights under § 25-409. First, the court should recognize and apply a presumption that a fit parent acts in his or her child's best interest in decisions concerning the child's care, custody, and control, including decisions concerning grandparent visitation. See *Troxel*, 530 U.S. at 68-69, 120 S. Ct. at 2061; 147 L. Ed. 2d at 58-59; *Jackson*, 199 Ariz. 306, ¶13, 18 P.3d 100, ¶ 13; Crafton, 752 N. E.2d at 96, 98. That presumption, however, is rebuttable. See *Troxel*, 530 U. S. at 87, 120 S. Ct. at 2071, 147 L. Ed. 2d at 69 (Stevens, J. , dissenting); *Crafton*, 752 N.E.2d at 96, 98; cf. *In re United States Currency of $315,900.* 00, 183 Ariz. 208, 212-13 n.7, 902 P.2d 351, 355-56 n. 7 (App. 1995) (presumption is not evidence that can or should be weighed but, rather, only dictates the order and burden of proof). As the

Indiana appellate court stated in *Crafton*, " a grandparent seeking visitation has the burden of rebutting the presumption that a decision made by a fit parent to deny or limit visitation was made in the child's best interest. " 752 N.E.2d at 96-97.

¶18 Second, a trial court must consider and give "some special weight" to a fit parent's determination of whether visitation is in the child's best interest and give "significant weight" to a parent's voluntary agreement to some visitation, albeit not as much visitation as the grandparent desires. *Troxel*, 530 U.S. at 70-72, 120 S. Ct. at 2062-63, 147 L. Ed. 2d at 59-61. See also *Jackson*, 199 Ariz. 306, ¶¶13, 14, 18 P.3d 100, ¶ ¶13, 14; *Crafton*, 752 N.E.2d at 96-98. The amount of weight a trial court should place on these factors is not entirely clear because *Troxel's* plurality opinion "does not describe precisely the extent to which [a parent's decision on visitation] will control" and "left that issue for development on a case-by-case basis." *Harrington v. Daum*, 18 P.3d 456, 460 (Or. App. 2001); cf. *In re Marriage of Harris*, No. D036144, 2001 WL 1113062, at *6, *12 (Cal. Ct. App. Sept. 24, 2001) (holding that, although *Troxel* does not so specifically require, California Constitution requires "grandparent seeking visitation rights over the objection of a fit parent to show by clear and convincing evidence that the parent's decision would be detrimental to the child").

¶19 Nonetheless, the evidentiary presumption and weight requirements, in our view, should

help avoid visitation orders "based solely on the judge's determination of the child's best interests" or on the judge's "mere disagreement" with a fit parent's choice. *Troxel*, 530 U.S. at 12 67-68, 120 S. Ct. at 2061, 147 L. Ed. 2d at 58. See Susan Tomaine, Comment, Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family, 50 Cath. U. L. Rev. 731, 781-83 (2001). In sum, the foregoing principles affect but do not necessarily control a trial court's determinations of "best interests of the child" and "reasonable [grandparent] visitation rights" under our statute. § 25-409(A).

¶20 "If possible, we construe a statute so as to avoid rendering it unconstitutional, resolving any doubts in favor of its constitutionality. " Ramirez, 193 Ariz. 325, ¶20, 972 P.2d 658, ¶20. When, as here, the issue is whether a statute was or may be constitutionally applied, we must attempt "to give it a reasonable and constitutional meaning." *Hansson v. State Bd. ofDental Examiners*, 195 Ar iz. 66, ¶11, 985 P.2d 551, ¶11 (App. 1998). With those concepts in mind, we conclude that a trial court must not only apply "the statute as written," but also must afford a fit parent the procedural and evidentiary safeguards discussed above in order to apply § 25-409 in a constitutionally acceptable manner. *Jackson*, 199 Ariz. 306, ¶14, 18 P.3d 100, ¶14. Superimposing those safeguards on § 25-409 is compatible with the statute and alleviates any constitutional concerns in applying it.

¶21 In granting the mother's post-Troxel motion for reconsideration and vacating its prior grandparent visitation order, the trial court noted that it essentially had used the "same trial procedures . . . as were used by the trial judge in *Troxel.*" Based on the various reasons specified in its order, see ¶5, supra, the trial court concluded that it had unconstitutionally applied § 25-409 in a manner that "violated the mother's fundamental right to parent her child without state interference. " Because we have no way of knowing how the trial court weighed the evidence and allocated the burdens of proof at trial, we must defer to its hindsight on such matters and have no basis for questioning the court's reasons for vacating its prior or der. Therefore, we affirm that aspect of the trial court's August 2000 ruling.

¶22 But we need not defer to the trial court's ultimate ruling, which presumably was based on its reading of *Troxel*, that " [t]he issue of grandparent visitation is left in the discretion of the mother." We cannot discern either from the court's order itself or from the record precisely what that ruling means in practical terms. The court's original order granting visitation noted that the mother "object[ed] to the proposed schedule [of the court-appointed psychologist] and urge[d] a more limited visitation arrangement." Similarly, the trial court noted in its subsequent order that the mother had "wanted the issue of visitation with the grandparents to be her decision alone" and that the court had not

"credit[ed] the mother with offering visitation to the grandparents, though less than they wanted." Neither the trial court's orders nor the trial-transcript, however, specifies the amount or frequency of grandparent visitation the mother was agreeable to at the time of trial or five months later, when the trial court reconsidered and vacated its visitation order based on *Troxel*. Nor, of course, does the record reflect what frequency or amount of grandparent visitation the mother has allowed, if any, in her "discretion" from August 2000 to the present.

¶23 Apparently, unlike this case, the parents in *Dodge I* and *Jackson* sought to discontinue or terminate grandparent visitation rights altogether. *Dodge I*, 195 Ar iz. 119, ¶9, 985 P.2d 604, ¶9; *Jackson*, 199 Ariz. 306, ¶3, 18 P.3d 100, ¶3. But, even assuming the mother here merely sought to restrict, not totally preclude, grandparent visitation, we do not necessarily agree with the dictum in *Jackson* that § 25-409 "applies only in cases in which a parent has denied visitation, not merely limited it." 199 Ar iz. 306, ¶14, 18 P.3d 100, ¶ 14. Neither § 25-409(C)(1) through (C)(4), which the Jackson court cited, nor any other Arizona decision clearly imposes any such condition on grandparent visitation. We see no valid distinction between a parent who seeks to refuse grandparent visitation altogether and one whose offer to permit such visitation is so limited or unreasonable that it essentially fails to "foster[] relationships between grandchildren and their

grandparents." *Dodge I*, 195 Ariz. 119, ¶27, 985 P.2d 604, ¶ 27.

¶24 In our view, a parent's willingness to allow some visitation is but one factor to consider under § 25-409. As noted above, a trial court should give "significant weight" to that fact. *Troxel*, 530 U.S. at 72, 120 S. Ct. at 2063, 147 L. Ed. 2d at 60. See also Crafton, 752 N.E.2d at 86. As long as the tr ial court extends the aforementioned safeguards and makes the necessary findings pursuant to § 25-409, however, the statute permits the court to grant "reasonable [grandparent] visitation rights," which may vary from those agreed to or urged by the parent. § 25-409(A).

¶25 Under the circumstances, we deem it appropriate to remand the case for the trial court to conduct a further evidentiary hearing to determine whether to grant grandparent visitation and, if so, its extent or frequency. In reaching that same result, the Indiana court in *Crafton* stated:

> [T]he Record in this case has not been adequately developed in order to allow [the grandparent] a fair opportunity to present evidence to attempt to rebut the presumption that [the mother's] decision was in her children's best interest. At the time of the original hearing on [the grandparent's] Petition for Grandparent Visitation, [she] was unaware that she was required to disprove this presumption, so it would be inequitable to judge whether she has-

> rebutted the presumption based on the evidence presented at the prior hearing. Moreover, as it has been over three years since the original hearing, to make a proper determination under the requirements of *Troxel*, the trial court needs to hear evidence regarding the current situation between the parties and the children, [the mother's] currentdecision with regard to grandparent visitation (assuming her fitness is not at issue), and whether or not [the mother] is willing to voluntarily allow [the grandparent] any access to the children. Evidence on all of these issues is necessary if the trial court is going to apply the appropriate weight to evidence as required by *Troxel*. It would be unfair to the parties to ask the trial court to determine these issues based on a Record that was not made with these issues in mind. 752 N.E.2d at 98.

¶26 Because those same considerations apply here, we subscribe to that approach. Other than an unverified petition for contempt that the grandparents filed in June 2000 and that the

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[6]We strongly encourage the parties to stipulate to as many facts as possible on remand, including uncontroverted facts presented in the March 2000 trial, to avoid a needless waste of time in presenting repetitive evidence on undisputed matters.

trial court denied in its August ruling, nothing in the record specifically reflects how much or how little visitation actually was provided between April and August. Nor does the record reflect how or why the trial court ultimately determined to leave grandparent visitation solely in the mother's discretion or what evidence supported that ruling.

¶27 Under these circumstances, unlike some other appellate courts, we are unable to conclude as a matter of law that the grandparents did not carry their burden of rebutting the presumption of parental primacy or could not do so if given the opportunity. See *Harris*, 2001 WL 1113062, at *14; *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 487 (Ct. App. 2000); *State v. Paillet*, 16 P.3d 962, 971 (Kan. 2001). Accordingly, we affirm the trial court's order of August 28, 2000, except for the aspect that left the issue of grandparent visitation solely "in the discretion of the mother." We vacate that portion of the order and remand the case to the trial court for further proceedings consistent with this decision. [6]

¶28 In our discretion, we deny the mother's request for an award of attorney's fees on appeal because she cites no basis for the request. See Ariz. R. Civ. App. P. 21(c), 17B A.R.S.; *In re Wilcox Revocable Trust*, 192 Ar iz. 337, ¶21, 965 P.2d 71, ¶21 (App. 1998) ("We will award no attorney's fees where no basis for the award is cited to us."). See also *Kromko v. Superior Court*, 168 Ar iz. 51, 61, 811 P.2d 12, 22 (1991); cf. A.R. S. § 25-324 (permitting court to award attorney's

fees on appeal under specified circumstances).

JOHN PELANDER, Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Presiding Judge

M. JAN FLÓREZ, Judge

Denial of Petition for Review by the Arizona Supreme Court

Supreme Court
State of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3291

Noel K. Dessaint
Clerk of the Court

Kathleen E. Kemply
Chief Deputy Clerk

February 14,2002

RE: MONTIE McGOVERN/ANN McGOVERN v TAMMY McGOVERN
Arizona Supreme Court No. CV-01-0410-PR
Court of Appeals Division Two No. 2-CA-CV 01-0016
Pima County Superior Court No. D-125189

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 12, 2002, in regard to the above-referenced cause:

ORDERED: Petion for Review – Denied
Record returned to the Court of Appeals, Division Two, Tucson, this 15th day of February, 2002

Noel K Dessaint, Clerk

TO:
Cheryl K Copperstone
Paul S Rowley, Roberts & Rowley LTD
Jeffery P Handler, Acting Clerk, Court of Appeals
Division Two, Tucson
Lexis-Nexis
West Publishing Company

Denial of Stay of Mandate Pending United States Supreme Court action on Petition for Writ of Certiorari

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ORDER

2 CS-CV 2002-0016
Department A
Pima county
Cause No. D-125189

RE: MCGOVERN v. MCGOVERN

Pursuant to Application for Stay of Issuance of Mandate, RESPONSE TO APPELLANT'S REQUEST FOR MANDATE, and REQUEST FOR MANDATE,

ORDERED: Application for Stay of Issuance of Mandate is denied.

Judges Florez and Pelander concurring.

DATED: March 26,2002

J. William Brammer, Jr.
Presiding Judge

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Supreme Court, U.S.
FILED
MAY 29 2002
OFFICE OF THE CLERK

No. 01-1595

IN THE

Supreme Court of the United States

TAMMY McGOVERN,

Petitioner,

v.

MONTIE and ANN McGOVERN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

The Petitioner cites this Court's Rule 11(c) (intending to cite Rule 10(c)) for the Court's jurisdiction. Neither rule, however, establishes jurisdiction in this matter, and jurisdiction lies, if at all, under 12 U.S.C. § 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Jurisdiction does lie under § 1257 with respect to the Petitioner's Question Number 1; the Petitioner sought review of the complained-of decision by bringing an unsuccessful Petition for Review of that decision before the Arizona Supreme Court. The Petitioner, however, never sought state supreme court review of the Court of Appeals' denial of the Petitioner's application to stay mandate (Question Number 2). As such, this Court is without jurisdiction to consider that Question.

MATERIAL FACTS

This matter concerns a child, Chloe McGovern, daughter of Petitioner Tammy McGovern and the sole grandchild of Respondents Montie and Ann McGovern (Tammy's parents).

In mid-1994 Tammy moved herself and two-week old Chloe from California into the McGoverns' Tubac Arizona

home. Tammy and Chloe thereafter resided with the McGoverns as family for the next four and one-half years, until the Petitioner abruptly moved herself and Chloe to Tucson in January of 1999.

Up until the move to Tucson, Montie and Ann's caring for and interactions with Chloe were part and parcel of daily existence for all. *Inter alia*, Ann provided daily care for Chloe while Tammy worked (first part-time and later full-time) and attended college, and the McGoverns were found by the trial court to have provided "substantial and significant financial, physical and emotional support" for both Tammy and Chloe. The Respondents were far more than the usual sort of grandparents to Chloe, and they and their granddaughter were extremely fond of each other and were very highly bonded to one another.

For several weeks following the Petitioner's move to Tucson the Petitioner allowed visitation between Chloe and the Respondents. At that point, however, the Petitioner cut off visitation. Despite Respondents' pleas, visitation was not resumed and the Respondents subsequently filed their petition in Superior Court for court-ordered visitation. Only in May of 1999 (four months into the Petitioner's denial of visitation) did the Petitioner agree to allow visitation to resume. At that time, on the very cusp of hearing on the issue of *pendente lite* visitation, a stipulated *pendente lite* order for visitation was entered, which remained in effect through the March 2000 trial on the merits and the trial court's April 2000 decision.

In its April order the trial court found that visitation between the Respondents and Chloe had been shown to be "clearly in the best interest of the child", and the court

established a modest visitation schedule between Chloe and her grandparents. As the Petitioner admits, however, no visitation took place subsequent to the entry of the trial court's April 2000 order.[1]

The Petitioner did not comply with the visitation schedule as established in the April order. Nor has she otherwise allowed visitation between Chloe and her grandparents on an informal basis, after that order was stayed[2] and then subsequently vacated by the trial court on the Petitioner's motion for reconsideration. It is now over two years since Tammy McGovern has permitted visitation or contact between Chloe and her grandparents.

In August 2000 the trial court granted the Petitioner's motion to reconsider the April 2000 ruling, holding that it had failed to conduct the trial and consider the evidence in accord with the requirements of *Troxel v. Granville* — which had been decided in the interim. The Respondents appealed. On appeal, the Court of Appeals found itself compelled to defer to the trial court's hindsight on those matters, but found insufficient support in the record to explain or sustain the trial court's ruling that visitation be left "in the discretion of

---

1. *See* Petition for Writ of Certiorari ("Petition"), at 5. In this vein, the Petitioner states (*id.*) that while she attempted to arrange visitation following the April 2000 order, the "grandparents never agreed to visitation timings that were remotely consistent with [the Petitioner's] difficult and very full life." The Respondents dispute the accuracy of this account.

2. In response to the Petitioner's request for emergency stay (based on *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)), the trial court stayed its April 10, 2000 order on June 21, 2000.

the mother." For this reason and because the Court determined that fairness required that the grandparents be given the opportunity to present their case under the then-known requirements of *Troxel*, the Court remanded the matter to the trial court for further proceedings to determine whether visitation was appropriate.

REASONS FOR DENYING THE WRIT

The Petitioner asserts that the remand's call for further proceedings creates such an unbearable burden upon her as to itself constitute a violation of due process.

While the Petitióner here cries constitutional foul, what the Petitioner in fact is seeking is simply delay, not the setting-right of any due process injury.

No such foul taints the decision at issue here, much less one which might merit the attention of this Court. Delay is the Petitioner's game and her goal is one of continuing for so long as possible the absence of contact and reasonable visitation between Chloe and the McGoverns. It has been over two years now since the child has seen her grandparents, who had for so long played such a positive, central and crucial role in her life. This drought did not come about by accident but arose by design, obviously. It could have been otherwise, clearly, for the trial court's August 2000 decision left visitation in the Petitioner's "discretion". "Discretion" and visitation, however, have both been unfulfilled here, along with the best interests of one particular little girl.

A. The Denial of Stay of Mandate Presents No Justiciable Question

The mandate in this matter issued as provided under Arizona rules and procedures as a matter of course. The mandate having issued, the trial court will set its evidentiary hearing for the case-on-remand; in accord with the instructions of the Court of Appeals, the trial court will consider the evidence and determine whether an order for visitation is proper here, and if it is, in what amount and under what terms.

The parties will make their respective cases/defenses, having now been apprised of the constitutional presumptions and protections required by *Troxel* and its progeny. In rendering its decision the trial court will apply those rules. The Respondents are confident that the evidence will persuasively show that notwithstanding the long and unfortunate hiatus in the contact between Chloe and her grandparents, an order for reasonable meaningful visitation will be again be found to be clearly in Chloe's best interest, and that such an order may properly issue, without violation of Tammy's constitutional rights.

This, of course, is precisely what is feared by the Petitioner, who views the continued delay and rupture in contact to be a circumstance which will ultimately redound to her benefit. If, after all, the mandate were stayed and non-contact were continued as the rule for a further 6 months or a year or two more, might that not tend to degrade the affection and bond that Chloe has with her grandparents?; and would that not tend to make it less likely that an order for visitation might subsequently be found to be clearly in Chloe's best interests?

While such reasoning by the Petitioner is consistent with her conduct, she has made no such confession here, and she attempts, rather, to create a constitutional question out of a mandate unstayed.

However, even assuming a constitutional question were potentially in play, the Petitioner's failure to bring the denial of the stay of mandate before the Arizona Supreme Court renders the question non-justiciable. 28 U.S.C. § 1257; *Gorman v. Washington University*, 316 U.S. 98, 62 S. Ct. 962 (1942). While the Petitioner suggests that there was no possibility of any effective review of the order by the Arizona Supreme Court, she offers no hint of any authority or evidence for this claim, a claim which is clearly false.

Indeed, in her application for stay in the Court of Appeals itself the Petitioner raised no argument that the stay was required on constitutional grounds, and she thereby waived any right to bring this supposed claim before this Court. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S. Ct. 2296 (1983).

There is, moreover, no *bona fide* constitutional question at issue in the first place. The Petitioner cites no authority on this question (her Question 2) at all. She cites not a single decision which is remotely supportive of the notion that an appellate court's denial to issue an admittedly discretionary stay of mandate has or might constitute a federal due process violation under any circumstances, much less under the circumstances of this case.

The Petitioner's naked supposition that stays are routinely granted in circumstances such as are presented here is wholly without foundation, and her suggestion that the

Court of Appeals' denial of the stay was grounded in improper motivations (Petition at 17) is, frankly, outrageous. The Court, rather, likely viewed the Petitioner's *pro forma* two-sentence application for stay as simply unpersuasive and ill-advised under the circumstances. Such a conclusion would be a natural and reasonable one in a case such as this, where the nature, intensity and duration of the bonds between child and grandparent were so pronounced; where an order for visitation might well again be found to be appropriate as being in the best interests of the child; where no such order had been in place for a year and a half; where the record showed the mother to have refused visitation in the absence of an order; and where there was no evidence that the mother had allowed visitation during the course of the lengthy appeal. In visitation matters, particularly, justice delayed is justice denied.

Finally, the Petitioner's second Question must be answered in the negative for the reason that it fails to fall within the parameters of this Court's Rule 10(c), and because it is predicated on the unsustainable premise that the Court of Appeals decision to remand the matter for retrial was constitutionally infirm.

B. The Remand Was Proper and Constitutionally Unobjectionable

In support of the claim of constitutional injury asserted in her Petition, Tammy McGovern relies upon the words of Justice Kennedy's dissent in *Troxel* that:

> It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations

> for the child's welfare becomes implicated. . . . If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. [530 U.S. at 101, 120 S. Ct. at 2079]

Justice Kennedy's concerns were expressly shared by the plurality in *Troxel*, and cited in connection with its decision not to remand.

Were the facts of the case *sub judice* on all fours with those present in *Troxel*, the propriety of remand here might well be questionable. That said, whether such action, would, under such circumstances, in fact amount to a constitutional violation is very much an open question; so far as counsel is aware, in no decision (the *Troxel* plurality included) has any court held that a reviewing court's remand was or would be constitutionally forbidden as the Petitioner claims is the case here.

Furthermore, notwithstanding the Petitioner's assertions to the contrary, the facts of this case differ from those of in *Troxel*, and those differences are many and substantial. For example, Justice Kennedy's words cited above were expressed in a case in which the question of grandparent visitation had then been the subject of litigation for well over six years, and which had included two passes through the Washington Court of Appeals, a further full-scale review by the Washington Supreme Court and another comprehensive review by this Court. The burdens of litigation here have been substantially less than in *Troxel*.[3]

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3. Similarly, although the Petition is liberally peppered with assertions that the Petitioner has been financially overwhelmed by the course and costs of litigation, and while Arizona law permits an (Cont'd)

Moreover, the relationships in *Troxel* and those here vary substantially. For example, the quality, quantity and duration of the pre-existing contact in *Troxel* did not remotely approach that which is found here; there was not presented in *Troxel* any suggestion of the sort of strong bond and attachment between the child and grandparents — the intensive, long, and caring relationship — which the evidence and the trial court's findings here undisputedly affirm.

A further feature which prominently distinguishes the cases concerns the question of visitation which the parent in *Troxel* afforded the grandparents, as compared to this case. In *Troxel*, there was no denial of visitation, but the parent's offer of visitation, rather, was rejected as insufficient by grandparents, who then sued to secure more visitation than had been offered. While there was no cut-off of visitation by the parent in *Troxel*, shortly following her move to Tucson in early 1999 the Petitioner responded to her parents' requests for somewhat greater visitation by cutting off visitation altogether for four months. The Petitioner agreed to a resumption of some degree of visitation between Chloe and her grandparents only at the court-house door. This evidence is undisputed in the record, and was noted by the Court of Appeals. *See* Opinion at, *e.g.*, ¶ 3 and footnote 5.[4]

(Cont'd)
award of fees in such actions where there is a financial disparity between the parties (A.R.S. § 25-324), the Petitioner made no showing of an entitlement to fees either to the trial court or to the Court of Appeals, both of which denied her claim for fees in their respective courts. (Nor did Tammy cross-appeal the trial court's denial of fees).

4. The Petitioner claims (Petition at 14) that the Court of Appeals was "confused" with respect to this question, and that the four-month long break was simply due to an extended childhood infection.
(Cont'd)

While the above-noted features do not exhaust the universe of relevant dissimilarities between the cases of *Troxel v. Granville* and *McGovern v. McGovern*[5], they do render it clear that the facts of the instant case are markedly distinct from those of *Troxel*. It is unsurprising, therefore, that while remand in *Troxel* was found to be inappropriate, the opposite is true here.

A fair review of the Court of Appeals' Opinion reveals the Court to have harbored concerns regarding the Petitioner's having cut off visitation for four months at beginning of 1999, and regarding the failure of the record to reflect with any specificity what amount of visitation (if any) the Petitioner was in fact purportedly willing to offer at the time of trial and the trial court's decisions. *See, e.g.*, Opinion, at footnote 5 and ¶¶ 22-25, 26. Under *Troxel*, a parent's ***bona fide*** willingness to allow "***meaningful***" visitation is a factor which should be given "significant weight" in a grandparent visitation determination (530 U.S. at 72), such that the

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(Cont'd)

This ahistorical "explanation" of the rupture in visitation is wholly unsupported by the record. Nor was the Court of Appeals confused on the question: the Respondents' (Appellants') Opening Brief brought this to the Court's attention (with record support), which the Petitioner was unable to dispute in her Responsive Brief (which failure was in turn pointed out in the McGoverns' Reply Brief).

5. Further material differences include, for example, the fact that the Arizona statute is considerably more limited than the "breathtakingly broad" Washington State statute which the *Troxel* plurality found to so troubling, and the fact that unlike the case here, the trial court in *Troxel* apparently approached its decision while entertaining a presumption in favor of grandparent visitation (*versus* the appropriate (rebuttable) presumption, which favors the wishes of the parent).

existence of such *bona fides* tends to militate in favor of determination which accords with the parent's wishes. Conversely, the lack of such *bona fides*, in circumstances where visitation can objectively be found to be in the child's best interests, is substantial evidence in rebuttal of the presumption that the question of visitation should remain in the sole "discretion" of the parent.

As the Court of Appeals noted, not only was the record unclear as to what evidence supported the trial court's determination to leave the question of visitation in the Petitioner's sole discretion, but it was appropriate, given the silent, cloudy and/or undeveloped record, to remand the matter so that the parties could fairly try the case (and so the trial court might fairly consider and decide the case) in light of the constitutional lessons and presumptions which had been handed down in *Troxel* subsequent to the trial in this matter. The Indiana Court of Appeals had similarly resolved the appeal before that court, in markedly like circumstances. *Crafton v. Gibson*, 752 N.E.2d 78 (Ind. App. 2001).

The Petitioner faults the Court of Appeals for relying on *Crafton* in this regard. *Crafton*, so the Petitioner states, is materially distinguishable from the case at bench, for in *Crafton* visitation had been denied by the parent, while here no such denial of visitation had taken place. While the Petitioner points to two sentences in the trial court's August 2000 decision where the court does apparently contradict this denial of visitation, such statements were simply in error; as the Court of Appeals accurately noted (at footnote 5):

> The trial court in our case apparently found that the mother had not completely denied visitation to the grandparents at any time pertinent to its

> ruling. ***The record, however***, reflects that visitation neither occurred nor was offered for approximately four months between late January 1999 and the May *pendente lite* order. [Emphasis added.]

These and similar errors on the part of the trial judge here prompted the Court of Appeals to remand the matter to the trial court, since the Court was

> [U]nable to conclude as a matter of law that the grandparents did not carry their burden of rebutting the presumption of parental primacy or could not do so if given the opportunity.

(Opinion at ¶ 27.)

The Petition here does not place in doubt the reasonableness of this decision under the circumstances of the case, and it is not surprising that the Arizona Supreme Court found no reason to take review of the petition which the Petitioner brought before it.

The Petition makes no showing that the Court of Appeals' close study of the record and the law, and its careful resolution of the appeal, run afoul of constitutional due process protections on the grounds that a further fact-finding proceeding and determination is called for so that there be a fair determination on the question of whether or not Chloe's longstanding and especially close relationship with her grandparents should be protected and fostered. While it is logically possible that there exist remand decisions so unreasonable, egregious and ill-suited to the facts and to the parties' circumstances that they cry out for a determination by the United States Supreme Court that the consequent exposure to further litigation itself constitutes a denial of substantive due process under the Constitution, the decision of the Arizona Court of Appeals in *McGovern v. McGovern* does not fall among them.

Comment on two final (somewhat related) points may be appropriate before concluding this Brief in Opposition. First, the Petitioner's argument is predicated on the assumption that the *Troxel* plurality opinion is one which should be considered as a majority decision insofar as establishing constitutional precedent, and this Brief's responsive argument has assumed this as well. Counsel undersigned confesses that it is unclear to her that this is entirely accurate[6], and to the extent that it is not, then the Petitioner's arguments are all-the-more without merit.

Secondly, the Petitioner here casts herself in the mold of a beleaguered party whose role in this dispute and litigation is that of a party who is not truly an actor, but rather one who has been acted-against. This conception yields an inaccurate view on a number of accounts, not the least of which is that it obscures the active role which the Petitioner has taken in creating the unusually strong bonds and dependencies which exist between her daughter Chloe and her parents the McGoverns. Assuming, still, that the *Troxel* plurality constitutes binding precedent on the question of grandparent visitation as a general matter, this Court was not presented in *Troxel* with the sort of active involvement of the complaining party as is present here, and did not consider such in its decision.

Where, however, (as here) a parent invites *her* parents into the life which she has chosen for her daughter and herself, and makes them an important, daily and integral part of that life for an extended period of time; and where (as here) the child and the grandparents naturally come to have a deep,

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6. *See, e.g., Riley v. Taylor*, 237 F.3d 300, 329 (3d Cir. 2001); *Nevius v. Sumner*, 105 F.3d 453 n.6 (9th Cir. 12 1996); *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184, 189 (5th Cir. 1995).

enduring and long-lived bond; is it appropriate to say that the parent's constitutional rights would be impermissibly infringed by a court's seeking to ensure that such relationships continue? Does not such conduct, and the natural consequences of it, amount to a waiver of claim of constitutional foul with respect to an order of reasonable meaningful visitation between the child and her grandparents?

While a positive answer to this question is in no way necessary to justify the decision of the Court of Appeals here, the Respondents suggest that this hitherto-unconsidered question is appropriately answered in the affirmative, and that this aspect of the case constitutes yet a further reason for declining the Petitioner's invitation to this Court.

CONCLUSION

As this Court stated in *Palmore v. Sidoti*, 466 U.S. 429, 431, 104 S. Ct. 1879 (1984):

> The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court.

This observation again proves itself true with respect to the present Petition, and in light of the arguments set forth above, the Respondents respectfully request that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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No. 01-1595

In The

Supreme Court of the United States

Tammy McGovern,
Petitioner
v.
Monti and Ann McGovern,
Respondent

Reply to Brief in Opposition
For Writ Of Certiorari
To The Arizona Supreme Court

REPLY TO BRIEF IN OPPOSITION

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Questions

The following two questions are the result of a grandparent visitation litigation where the trial court declared that it had violated due process in applying Arizona law to the parent. The court then vacated it's previous orders granting visitation and returned parental control to the fit parent. Subsequently the Arizona Appeals Court, Division Two upheld the court's finding that the parent had been denied due process but remanded the case for a new trial.

1. When a case, involving a fit parent, is remanded for a new trial due to previous failure of the trial court to provide the parent due process does the new trial become such a burden on the parent, family, and parental rights that the new trial constitutes a further violation of due process?

2. Did the Arizona Appeals Court, Division Two, in refusing to grant a stay of the new trial, as anticipated under its own rules, pending the outcome of this petition to the United States Supreme Court further violate due process of the parent by inhibiting her access to appeals allowed by law?

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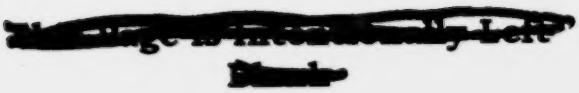


Reply to Brief in Opposition

Per United States Supreme Court Rule, 15.6, this is a reply to the new points made in the Brief in Opposition submitted in the instant case, 01-1595, on or about May 29, 2002.

Taken as a whole the Brief in Opposition relies on a number of facts, and in some cases interpretation of the record of the instant case that are generally speculative at best. While the Petitioner, Tammy McGovern, feels that each of these facts are individually disputable, at the same time disputing facts is not appropriate before this tribunal. Thus no space will be spent going individually over each alleged fact introduced in the Brief in Opposition and attempting to provide the Respondent's counter position.

However, taken as a body and individually, these alleged facts, even if they were true, fail in one other major respect. None are relevant to the questions raised in the Petition for Writ of Certiorari. The issue here is simple and based on the lack of any dispute of the central relevant facts. The lack of dispute of the central facts by the Petitioners suggests that they fail to dispute any relevant fact. These relevant facts are simple and all a matter of record as follows:

1. Tammy McGovern is a fit Mother. Both the trial court and the Arizona Appeals Court, as explained in the Petition for Writ of Certiorari affirm this fact. The Brief in Opposition does not dispute this conclusion of the court.

2. The Arizona Superior Court denied Tammy McGovern due process in conducting a bench trial. This lack of due process was confirmed by the trial judge and upheld by the Arizona Court of Appeals, Division Two (by failure to review likewise upheld by the Arizona Supreme Court).

3. The Mother endured a massive burden, The Mother endured four years of litigation, an unlawful *pende lite* visitation order, several months of an unlawful final visitation order (ultimately vacated by the trial court), and large legal bills with lingering debt. All this occurred while the Mother was working, supporting herself and her daughter, while simultaneously maintaining a full load as a nursing student in the University of Arizona. The Brief in Opposition attempts to argue that the Respondents, the aggressors in this action, did not have their wealth legally established. The financial status of the grandparents is irrelevant. There can be no doubt that litigation and unlawful visitation orders confiscating a large part of the Mother's precious quality time with her child was a burden for her both in financial and emotional terms. Whatever burden exists for the grandparents it was one they choose to assume. The Brief in Opposition attempts to likewise argue that litigation burden only becomes a burden when the litigation extends six years or more instead of the approximately four years of the instant case. Such an argument seems to be made without

any suggestion of a measure of what is or is not a burden. The Mother has no idea if her burden is heavier or lighter than that forced by the Washington Court system on Tommy Granville (Wynn) (see *Troxel v. Granville.* 530 U.S. 57, 120 S. Ct, 2054, 147 L. Ed. 2d 49 (2000)). She only knows it has been a very difficult time in her life with bills that are likely to go on as far as she can view into the future. Further her burden is not over but is to start over from the very beginning if she chooses to remain in her current community.

4. The Arizona Appeals Court, Division Two, gave no weight to the Mother's burden, while giving great, undue weight to the vague potential that somehow the grandparents if allowed more litigation may find some way to overcome her right to parent her child without interference from the state.

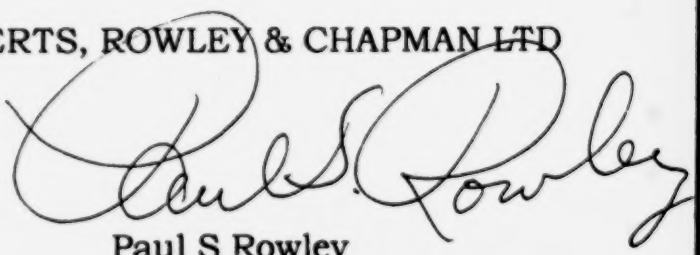
There is no dispute of these facts, and the immediate question it raises.

When does the burden of litigation become soo large that this burden outweighs any potential benefit to the state from further litigation? Without some constitutional limit to the ability for rich grandparents or other third parties to wage war by litigation, the constitutional protections extended by the fourteenth amendment become hollow at best. Is the standard the same for a fit parent as it is for some accused of a violent crime, that is litigation until every poten-

tial of a favorable outcome to the state or grandparents has been exhausted? None of the new facts alleged in the Brief in Opposition have any probative value to this question and in fact they tend to framework the issue. The issue is not whether the grandparents may possibly secure a different outcome afforded the opportunity of endless litigation but rather is the potential benefit to the state of this endless litigation outweigh the right for a fit parent to raise his or her child as she see's fit as guarenteed by the 14th Amendment.

RESPECTIVELY SUBMITTED this 12th day of June, 2002.

ROBERTS, ROWLEY & CHAPMAN LTD



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